IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. .....

BLOOMFIELD HILLS SCHOOL DISTRICT,
Petitioner,

vs.

STEPHEN J. ROTH, UNITED STATES DISTRICT JUDGE,
EASTERN DISTRICT OF MICHIGAN,
Respondent.

and

SCHOOL DISTRICT OF THE CITY OF BIRMINGHAM,
OAKLAND COUNTY, MICHIGAN,
Petitioner,

vs.

THE HONORABLE STEPHEN J. ROTH, DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION,
Respondent.

and

WEST BLOOMFIELD SCHOOL DISTRICT OF OAKLAND
COUNTY MICHIGAN and CLARENCEVILLE SCHOOL
DISTRICT OF OAKLAND AND WAYNE COUNTY,
MICHIGAN,
Petitioners,

vs.

THE HONORABLE STEPHEN J. ROTH, DISTRICT JUDGE
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION,
Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent Board of Education of the School District of the City of Detroit, a Michigan School District of the

first class (hereinafter referred to as "Detroit Board of Education"), a party to the principal litigation herein, *Bradley* v. *Milliken*, No. 35257 (ED Mich), respectfully submits this its Supplemental Brief in Opposition to the Petitions for Writs of Certiorari filed herein by Petitioners Bloomfield Hills School District, West Bloomfield School District of Oakland County, Michigan and Clarenceville School District of Oakland and Wayne Counties, Michigan, and School District of the City of Birmingham, Oakland County, Michigan.

OPINIONS BELOW

1. *Appellate:*

a. *Bradley* v. *Milliken*, 433 F2d 897 (CA6 1970).

b. *Bradley* v. *Milliken*, 438 F2d 897 (CA6 1971).

c. *Bradley* v. *Milliken*, ... F2d ..... (CA6 1972), cert denied ..... US ....., 41 USLW 3175 (Oct. 10, 1972).

d. *Bradley* v. *Milliken*, ... F2d ..... (CA6 November 27, 1972).

e. *Bradley* v. *Milliken*, ... F2d ..... (CA6 December 8, 1972), Petition for rehearing *en banc* granted, ... F2d ..... (CA6 January 16, 1973).

f. *Bloomfield Hills School District* v. *Roth*, ... F2d ..... (CA6 July 17, 1972) (denial of Petition for Writ of Mandamus and/or Prohibition).

g. *West Bloomfield School District, et al* v. *Roth*, ... F2d ..... (CA6 July 17, 1972) (denial of Petition for Writ of Mandamus and/or Prohibition).

h. *School District of the City of Birmingham* v. *Roth*, ... F2d ..... (CA6 August 7, 1972) (denial of Petition for Writ of Mandamus and/or Prohibition).

2. *District Court:*

a. *Bradley* v. *Milliken*, 338 F Supp 582 (ED Mich 1971) (ruling on segregation).

b. *Bradley* v. *Milliken*, ... F Supp ..... (ED Mich March 28, 1972) (ruling on intra-city plans of desegregation).

c. *Bradley* v. *Milliken*, ... F Supp ..... (ED Mich March 24, 1972) (ruling on propriety of metropolitan plans for desegregation).

d. *Bradley* v. *Milliken*, 345 F Supp 914 (ED Mich 1972) (ruling on desegregation area and development of plan.)

JURISDICTION

For the reasons discussed below, Respondent Detroit Board of Education suggests that the jurisdiction of the Court of Appeals below was improperly invoked in these cases under 28 USC §1651, and consequently the jurisdiction of this Court is improperly invoked by 28 USC §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

These cases involve the All Writs Statute, 28 USC §1651 (a):

> "The Supreme Court and all Courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principals of law."

QUESTIONS PRESENTED FOR REVIEW

I. Do Petitioners lack standing to apply to the Court of Appeals for Writs of Mandamus and/or Prohibition to limit the jurisdiction of a district court in a case to which Petitioners, by their own inaction, were not parties?

II. Are the Petitions for Writs of Certiorari non-justiciable on the grounds of mootness and/or prematurity, where the Court of Appeals, in its decision on the merits of the principal case herein involved, may substantially grant the relief requested by Petitioners?

STATEMENT OF THE CASE

Respondent Detroit Board of Education accepts as substantially correct the Statement of the Case presented by Petitioners in the various Petitions.

Respondent Detroit Board of Education would emphasize, however, one point made by each Petitioner: None of the various Petitioners herein have been parties to this litigation due to the fact that they declined to intervene as party-defendants, unlike numerous other suburban school districts, in the principal case of *Bradley* v. *Milliken*, No 35257 (ED Mich).[1]

Respondent Detroit Board of Education would further advise this Honorable Court that on December 8, 1972, the Court of Appeals for the Sixth Circuit issued its decision on the merits in *Bradley* v. *Milliken*, ... F2d ..... (CA6 December 8, 1972), vacated for hearing *en banc*, ... F2d ..... (CA6 January 14, 1973). In so ruling, the Court of Appeals stated:

> "We hold that school districts which are to be affected by the decree of the District Court are 'necessary parties' under Rule 19. As a prerequisite to the implementation of a plan in this case affecting any school district, the affected district first must be a party to this litigation and afforded an opportunity to be heard."

Bradley v. *Milliken*, ... F2d ..... (CA6 December 8, 1972), slip opinion at 68.

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[1] In each case, the Court of Appeals, in denying the requested writs, stated:

"This order is entered without prejudice to the right of the petitioner School Districts to file application to intervene in the case of *Bradley* v. *Milliken* now pending in the Eastern District of Michigan."

ARGUMENT

I. INTRODUCTION

On November 24, 1972, Petitioner Bloomfield Hills School District served its Petition for Writ of Certiorari on Respondent Detroit Board of Education. In that Petition, the Bloomfield Hills School District noted, at page 4:

> "Disposition of the appeal in [the principal case of] *Bradley* [v *Milliken*] may render this petition moot. It is respectfully requested, therefore, that this petition for Writ of Certiorari be held in abeyance pending final action by the Court of Appeals in *Bradley*. Petitioner will promptly advise the Court of its desire to press this Petition or withdraw it, depending upon such final action by the Court of Appeals."

Subsequent to the December 8, 1972 decision in *Bradley*, the Court of Appeals for the Sixth Circuit granted a rehearing *en banc*, ... F2d ..... (CA6 January 16, 1973), and in so doing vacated the previous opinion of that Court in accordance with Local Rule 3 (b). This action resurrected the possibility that Petitioners' causes would become moot, should their positions be vindicated by the Court of Appeals *en banc*, a point which Petitioner Bloomfield Hills School District has once again recognized:

> "Since disposition of the appeal in *Bradley* may render its Petition moot, Petitioner reiterates its request that its Petition for Writ of Certiorari be held in abeyance pending final action by the Court of Appeals in *Bradley*." Supplement to Petition for Writ of Certiorari of Bloomfield Hills School District at 2.

Thus, once again, by Petitioners' own conceptions of the case, these Petitions for Writs of Certiorari are premature.

Accordingly, Respondent Detroit Board of Education submits this Supplemental Brief in Opposition to Certiorari

to respond to the Petitions which have arisen from somnolence through Petitioner Bloomfield Hills School District's Supplement to Petition for Writ of Certiorari.

II. NOT HAVING BEEN PARTIES TO THE PRINCIPAL LITIGATION IN THIS CASE, PETITIONERS WERE ABSOLUTELY WITHOUT STANDING TO APPLY FOR WRITS OF MANDAMUS AND/OR PROHIBITION.

By their own admission Petitioners were not parties to the principal litigation of *Bradley* v. *Milliken*. *See* Petition for Writ of Certiorari of Bloomfield Hills School District at page 3; Petition of West Bloomfield School District, *et al* at Page 4; Petition of School District of the City of Birmingham at page 6. It is submitted that Petitioners consciously and knowingly declined to intervene as parties-defendant in *Bradley*, unlike numerous other suburban school districts.

However, upon discovery that Petitioners were being included in a metropolitan plan of desegregation, they attempted to sue out a Writ of Mandamus and/or Prohibition in the United States Court of Appeals for the Sixth Circuit, which applications were denied by the Court of Appeals in July and August, 1972.

It is manifestly clear that the denials of the applications for the Writs by the Court of Appeals were correct, for the reason that the Petitioners were not parties to the principal cause of action in the District Court. Indeed, in a case turning upon substantially similarly procedural facts, *In re Heiloroner*, 69 F2d 643 (CCA2 1934), Judges Learned Hand, Thomas Swan, and Augustus Hand, in a *per curiam* opinion, precisely pinpointed petitioners' procedural defect:

"The Petitioners have not tried to intervene in

> the suit in the District Court, and are not therefore parties to it. . . . It is indeed true that any intervention must be 'in subordination to and recognition of, the propriety of the main proceedings', and some decisions construing it have gone as far as they assert. [citations omitted] We have never passed upon the point, and it is possible that we might construe the rule otherwise; at least it seems best to reserve any declaration regarding it. [citations omitted] We can still decide these applications, because though the rule means what they say, it does not justify a resort to prohibition. That Writ we may issue only in aid of our appellate jurisdiction. [citations omitted] *If it appeared that the entry of the order would deprive us of an appeal which might otherwise come before us, we might act. But it will not; at least it would not if the Petitioners had acted in season, had asked leave to intervene. Had they been admitted, they could have appealed; we are not to suppose that the District Court would have refused to allow them to intervene.* On that appeal we might hold that they could not raise the question which they wish to raise; if so, it would be because they could not raise it below. *Nevertheless, the appeal would search the correctness of everthing which they could challenge in the District Court".* 69 F2d at 644. Emphasis added.

Precisely the same situation is before this Court; Petitioners could have asked for leave to intervene at the District Court level.[2] That they chose not to do so can only be regarded as conscious acts, calculated by them, however erroneously, to serve their best interests. Nevertheless, *In*

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[2]c.f. Orders of Court of Appeals, denying applications for Mandamus and/or Prohibition, where it is stated in each order:

"This order is entered without prejudice to the right of the petitioner School Districts to file application to intervene in the case of *Bradley* v. *Milliken* now pending in the Eastern District of Michigan."

Re Heilbroner stand as solid authority for the proposition that a Writ of Prohibition will not lie in the Court of Appeals at the instance of persons not parties to the principal litigation in the District Court. Petitioners not having been parties to ***Bradley*** v. ***Milliken,*** the Court of Appeals properly denied their applications for Writs of Mandamus and/or Prohibition.

III. THE PETITION FOR WRIT OF CERTIORARI PRESENTS PREMATURE ISSUES TO THIS COURT THE RESOLUTION OF WHICH SHOULD, IN THE INTEREST OF SOUND JUDICIAL DISCRETION, BE DECLINED AT THIS TIME.

In their Petitions for Writs of Certiorari, Petitioners raise two issues. The first is that the action of the District Court below deprived each petitioning school district of due process of law by ordering implementation of a plan of desegregating Detroit Schools by means of cross-district pupil transportation into, *inter alia,* the Bloomfield Hills School District, the West Bloomfield School District, the Birmingham School District, and the Clarenceville School District, despite the non-joinder of those Districts as parties. The second is that certain orders of the District Court in *Bradley* v. *Milliken* were jurisdictionally defective due to the Court's failure to convene a three-judge panel. In its letter to the Honorable Michael Rodak, Clerk of this Honorable Court, Petitioner Bloomfield Hills School District asserts that the decision of the Court of Appeals (since vacated for hearing *en banc*) in *Bradley* v. *Milliken* does not cure the District Court's denial of due process with respect to the Petitioner, since the Court of Appeals held "it will not be necessary for the District Court to find discriminatory conduct on the part of each school district,

either de jure or de facto, as a prerequisite to including such district in a desegregation area to be defined by the Court's degree," slip opinion at 68.

Both of these issues are prematurely raised before this Court. In the first place, should the Court of Appeals' decision of December 8, 1972 be reinstated or if a substantially similar opinion of the Court should issue, upon Petitioners' joinder as necessary parties at the District Court level, they may well find it desirable to raise both of these issues by objections to the District Court's jurisdiction. Even assuming *arguendo* that the District Court may rule contrary to Petitioners' position, they thereafter have available to them the conventional and proper means of appeal to properly object to such a decision.

Secondly, the very issues which Petitioners assert herein are once again before the Court of Appeals, to be determined by the whole Court sitting *en banc*.

Under such facts, where a determination of legal issues raised will in all likelihood be made by the Court of Appeals henceforth, it is established practice to decline to hear a case, on the grounds that a premature, and hence non-justiciable controversey is presented. Respondent recalls, to this end, the words of Justice Rutledge in *Rescue Army* v. *Municipal Court*, 331 US 549 (1947):

> "[*T*]*his Court has followed a policy of strict necessity in the disposing of constitutional issues* [*which*] *has not been limited to jurisdictional determinations.* For, in addition, 'The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.' [citation omitted] Thus, those rules

> were listed in support of the statement quoted, *constitutional issues* affecting legislation *will not be determined . . . in advance of the necessity* of *deciding them; . . .*" 331 US at..... Emphasis added.

Under such a doctrine, Respondent Detroit Board of Education submits that the issues presented herein are prematurely raised in this Court. All such issues are before the Court of Appeals once again, to be argued and decided in the near future. Respondent Detroit Board of Education sees no "special and important reasons" (c. f. Supreme Court Rule 19-1) for granting certiorari instead of allowing the Court of Appeals to render its determination. *See* Supreme Court Rule 20 (writ of certiorari to review case pending in a Court of Appeals granted only on showing of great public importance justifying deviation from normal procedures).

Thus, even though it is submitted that this Court is without jurisdiction over the petitions for Writs of Certiorari, for the reasons the Petitioners were not parties to the principal case, as discussed above, the availability of other forums for determination of Petitioners' claims should preclude consideration of those claims by this Court "in advance of the necessity for deciding them." *Rescue Army* v. *Municipal Court, supra.*

CONCLUSION AND RELIEF

The petitioning School Districts not having been parties to the principal litigation involved herein, the Court of Appeals was without jurisdiction to issue Writs of Mandamus and/or Prohibition. Therefore, the decisions of the Court of Appeals to deny the applications were correct.

Further the pendency of the principal case herein, *Bradley* v. *Milliken,* in the Court of Appeals renders pre-

mature all claims contained in the Petitions for Writs of Certiorari.

For the above reasons, Respondent Board of Education of the School District of the City of Detroit respectfully prays this Court that the Petitions for Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit, heretofore filed herein, be *denied.*

Respectfully submitted,
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